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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL and ERIC KNUTZEN on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. AT&T CORP., et al., Defendants.	CASE NO. CV-06-0672-VRW NOTICE OF MATTER UNDER SUBMISSION AND REQUEST TO BE HEARD AT CASE MANAGEMENT CONFERENCE Hearing Date: August 8, 2006 Time: 2:00 p.m. Place: Courtroom 6, 17th Floor (Hon. Vaughn R. Walker) Complaint Filed: January 31, 2006

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INTRODUCTION

Proposed intervenors CondéNet Inc. and Wired News respectfully provide notice to the Court and the parties, pursuant to Local Rule 7-13, that their motion to intervene and for an order unsealing documents remains under submission. Proposed intervenors urge the Court to rule on the motion, notwithstanding the Court's interim stay of proceedings or any stay on appeal, and request the opportunity to be heard on this issue at the Case Management Conference to be held on August 8, 2006.

BACKGROUND

Lycos, Inc. and Wired News moved to intervene and for an order unsealing documents in this action on May 23, 2006 (Docket No. 139). The motion sought the disclosure of the Klein and Marcus Declarations and Exhibits A-C to the Klein Declaration, which were filed under seal in support of plaintiffs' Motion for Preliminary Injunction (Docket Nos. 229, 230, 231). The motion to intervene and for unsealing was taken under submission by the Court after hearing on June 23, 2006 (Docket No. 281).

On July 20, 2006, the Court denied the motions of defendant AT&T Corporation and intervenor United States to dismiss the complaint (Docket No. 308). However, the Court has not ruled on the motion of Lycos and Wired News, nor has it ruled on the motion to intervene and for an order unsealing documents filed by *USA Today*, Associated Press, Bloomberg News, *Los Angeles Times, San Francisco Chronicle*, and *San Jose Mercury News* (Docket No. 133).

On August 2, 2006, the Court granted an interim stay, and informed the parties that it would hear argument on the motions of AT&T and the government to stay proceedings pending appeal on August 8, 2006 (Docket No. 330).

On August 4, 2006, Lycos, Inc., Wired News and the parties stipulated to the substitution of CondéNet Inc. for proposed intervenor Lycos, Inc. (which sold Wired News to CondéNet Inc. on July 11, 2006) and submitted a proposed order to the Court (Docket No. 331).

ARGUMENT

The United States Supreme Court and the Circuits consistently have held that the presumption of access to judicial records necessarily includes a right of *immediate and contemporaneous* access. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 560 (1976); Continental Illinois Securities Litigation, 732 F.2d, 1302, 1310 (7th Cir. 1984). "The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994); *see also* Valley Broadcasting Co. v. U.S. District Court, 798 F.2d 1289, 1292, 1297 (9th Cir. 1986) (writ relief proper where judge denied immediate access to trial exhibits). "[E]ach passing day may constitute a separate and cognizable infringement of the First Amendment." Nebraska Press Ass'n v. Stuart, 423 U.S. 1327, 1329 (1975) (Blackmun, J., in chambers).

Immediate access is not merely for the convenience of the press; rather, it is a critical structural element in our judicial system. "[P]ublic access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the form of public opinion is an effective restraint on possible abuse of judicial power.'" Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 588, 592 (Brennan, J., concurring) (quoting In re Oliver, 333 U.S. 257, 270 (1943)); *see also* State of Cal. v. Safeway, Inc., 355 F. Supp. 2d 1111, 1125 (C.D. Cal. 2005) (presumption of access exists to permit citizens "to observe, monitor, understand and critique their courts . . . because what transpires within our courtrooms belongs to our citizens in a fundamental way").

Intervention was properly and timely sought in this action for the purpose of obtaining access to documents that had been filed under seal. *See* San Jose Mercury News v. U.S. District Court, 187 F.3d 1096, 1100 (9th Cir. 1999) (approving intervention by the press). Although the parties have filed redacted versions of the Klein and Marcus declarations (Docket Nos. 147, 277), substantial portions of those documents remain secret, and the exhibits to the Klein Declaration remain sealed in their entirety.

Proposed intervenors argued in their moving papers and at the June 23 hearing that (1) AT&T has not carried its burden of establishing that the sealed documents and redacted portions of the declarations are protected trade secrets, and, in any event, (2) AT&T's private interests must yield the far more important public interest in access to court proceedings involving the privacy and speech rights of many millions of Americans. Proposed intervenors requested that the Court, if it is not inclined to unseal the documents in their entirety, appoint a neutral technical advisor to assist the Court in determining whether any of the documents at issue contain trade secrets and, if so, what redactions are appropriate.

The Court acknowledged the importance of the Klein Declaration in its Order denying the motions to dismiss. While the Court made its factual determination that the subject matter of the litigation was not a "secret" based on the public statements of AT&T and the government, the Court quoted extensively from the Klein Declaration and a statement by Klein published by Wired News, and the Court reached its conclusions about the disclosures of AT&T and the government based in part on press reports, many of which were based on the Klein materials. (*See* Docket No. 308 at 23-27, 29-31.)[1] Also, the Court heard argument based on, and has placed under seal, a binder prepared by plaintiffs' counsel that apparently contains information extracted from the Klein materials. (*See* Docket Nos. 284 (transcript at 65-69), 320, 327.)

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[1] The absurdity of the continued redaction of the Klein Declaration and sealing of its exhibits is established by the Court's citation on pages 23-24 of its Order to the Wired News posting on April 7, 2006 of Klein's out-of-court, unsworn statement describing AT&T's installation of fiber-optic splitting equipment for the government. Rather than cite to the redacted Klein Declaration, which even redacts the location of the AT&T facilities in question, the Court was compelled to turn to an unsworn statement published by the news media. (Exhibit J to the Erickson Declaration (Docket No. 43-2).) It also is noteworthy that, while the Court retains information under seal at the request of AT&T, in possibly one of the most important cases now pending in this country, AT&T has sought no other legal remedy for what it contends was a theft of its trade secrets.

Plaintiffs' reliance on this evidence and the Court's references to Klein's in- and out-of-court statements in its July 20, 2006 Order establish that the redacted and sealed documents go to the heart of this case. Given this, only the Court, and not the parties, can determine what should be sealed. *See* San Jose Mercury News, 187 F.3d at 1101 ("The right of access to court documents belongs to the public, and the Plaintiffs were in no position to bargain that right away."); Kamakana v. City & County of Honolulu, 447 F.3d 1172, 1183 (9th Cir. 2006) (court is not bound by agreement of the parties). The Court may not simply accept the redacted filings by the parties — which plaintiffs' counsel acknowledged at the June 23 hearing were the product of compromise. (Docket No. 284, at 120-21.) Rather, the Court must *independently* determine whether AT&T has met its burden of establishing that the materials are trade secrets and, if they are, whether AT&T's private interests outweigh those of the public. Kamakana, 447 F.3d at 1179-80 ("a district court must 'base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture'").[2]

As the Court is aware, appeal from the July 20, 2006 Order will consume many months. If the Court does not rule on the submitted motions to intervene and for unsealing, the public will be deprived throughout this period of access to vital evidence that the Court has read and considered, simply because AT&T has made a self-interested and unscrutinized assertion that the materials contain trade secrets. Given that plaintiffs' claims rest on inferences drawn from the Klein materials; the public should have access to the documents to judge for itself whether those inferences are properly drawn or whether, as AT&T contends, the interception described by Klein is benign. Further, it is *now* that the public and Congress are debating the legality and propriety of the government's interception program, and a national election approaches. Delaying access in this case is undoubtedly the same as denying access.

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[2] The Court's election not to explicitly base its July 20, 2006 Order on the Klein Declaration does not make moot the motion to intervene and for unsealing. In In re Coordinated Pretrial Proceedings., 101 F.R.D. 34, 44 (C.D. Cal. 1984), the court rejected the defendants' "conclusory statements regarding commercial sensitivity" and required them to establish that there was "a significant and specific need for continued protection." This applied to materials that had not been the basis for any adjudication: "If the rationale behind access is to allow the public an opportunity to assess the corrrectness of the judge's decision, documents that the judge *should* have considered or relied upon, but did not, are just as deserving of disclosure as those that actually entered the judge's decision." *Id.* at 43 (original emphasis).

The Court declined to dismiss the action because a blanket assertion of secrecy did not trump the Court's constitutional duty to adjudicate the disputes that come before it, "particularly because the very subject matter of this litigation has been so publicly aired." (Docket No. 308, at 36.) The Court should similarly consider the well-settled public right of contemporaneous access to judicial records, particularly in light of the gravity of plaintiffs' claims and the importance of this litigation to the public.

Accordingly, the Court should rule on the submitted motion of CondéNet Inc. and Wired News to intervene and for an order unsealing documents. The motion was timely filed and heard, and prompt public access to the documents remains as critical today as it was when they were filed under seal. Neither the interim stay nor any stay pending appeal should delay or preclude a ruling on the motion.

CONCLUSION

For the foregoing reasons, as well as those stated in the moving papers, CondéNet Inc. and Wired News request that the Court rule on their motion to intervene and to unseal the Declaration of Mark Klein and Exhibits A-C (Docket No. 230), and the Declaration of J. Scott Marcus (Docket No. 231).

DATED: August 7, 2006 Respectfully submitted,

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